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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

JANET E. HUME, Plaintiff and Respondent, v. EDWARD D. HUME, Defendant and Appellant.	A152546, A154161 (San Mateo County Super. Ct. No. CIV426301)

Fifteen years after this family dispute over son Edward D. Hume's[1] claims to a family property settled, and almost thirteen years after this court resolved the second of two appeals related to the judgment entered on that settlement, we address two additional appeals by Edward. After he filed and lost two contradictory motions regarding the 2004 judgment, Edward appeals from the trial court's September 2017 order denying his motion to "compel enforcement" of the judgment and its 2018 order denying his subsequent motion to vacate that same judgment as void. There was no error. We affirm.

BACKGROUND

The 2004 Settlement

Over 35 years ago Janet and Edward A. Hume (parents) purchased a property in Woodside, where they built their home. In October 2002 they filed this action against

[1] The parties share a common surname, so to avoid confusion we will use their first names. References to Edward are to Edward D. Hume. We intend no disrespect by this practice.

their son Edward after he claimed a one-third beneficial interest in the property. Edward cross-complained against his parents, his two sisters and others.

In July 2004 the parties entered into a settlement agreement that resolved their respective claims to the Woodside property as well as several others. Paragraphs 3.2 and 3.5 of the agreement addressed Edward's one-third interest in the Woodside property.

Paragraph 3.2 vested beneficial title and use of the Woodside property in the parents and prohibited Edward from "tak[ing] any action with respect to the Woodside Property including, but not limited to, transferring, hypothecating or encumbering his interest" without their written consent. To ensure Edward's compliance, he was required to deliver to his parents a grant deed transferring his "remaining interest" in the property to them to be recorded if he violated the prohibition against alienating or encumbering his interest.

The settlement agreement also required Edward to transfer two-thirds of his interest in the property to his two adult children "by executing the wealth transfer/gift plan described in Paragraph 3.5," structured to take advantage of gift tax exclusions. Edward was to gift each child an interest in the Woodside property worth $750,000, to "be completed in 2004 and as soon as practical." After those initial gifts he would make annual transfers in the amount of the annual gift tax exclusion until he had transferred two-thirds of his interest. "To ensure completion of the transfer of $1,500,000 of value from Edward to his children prior to December 31, 2004, as well as the annual transfers described above," Paragraph 3.5 required Edward to deliver to the parents an executed gift deed transferring 2/3 of his interest in the Woodside property to his children, to be recorded only if he failed to make any of the required transfers. The parents, in turn, agreed to transfer to Edward half of their interest in a property in Tustin and to release his responsibility for payment of an annuity obligation related to another transaction.

The settlement agreement stated that the trial court "shall keep jurisdiction of this matter" and that the settlement agreement was enforceable under Code of Civil Procedure section 664.6. [2] The parties dismissed the complaint and cross-complaint with prejudice.

Edward's Breach, the Motion to Enforce the Settlement, and the 2004 Judgment

By October 2004, Edward did not make any of the required gifts to his children. Instead, he deeded his entire one-third interest in the Woodside property to his limited liability company, Hollow Echo, LLC (Hollow Echo). When the parents discovered this transfer they moved to enforce the settlement agreement and void the Hollow Echo deed.

On December 7, 2004, the trial court granted the parents' motion to enforce the settlement and entered judgment in their favor. On March 1, 2005, the parents exercised their right under Paragraph 3.2 and recorded the deed transferring Edward's interest in the Woodside property to themselves.

On April 8, 2005, the court voided the transfer to Hollow Echo. The court found the transfer violated the settlement agreement "because Defendant did not obtain the prior consent of Plaintiffs. Additionally, the declarations of the adult children, establish that Defendant did not effect a valid transfer of a 1/3 interest in Hollow Echo LLC to each of them as he stated under oath in his December 22, 2004 declaration." The Court also found the transfer to Hollow Echo was fraudulent and violated the settlement agreement.

Edward appealed from the order and judgment enforcing the settlement agreement. In 2005 this court dismissed the appeal under the principle that an appellant who receives and accepts the benefits of a judgment is precluded from appealing it. (See *Epstein v. DeDomenico* (1990) 224 Cal.App.3d 1243, 1246.) In 2006 we affirmed the order voiding Edward's transfer of his interest in the property to Hollow Echo.

[2] Unless otherwise noted, further statutory citations are to the Code of Civil Procedure.

In 2017, Edward Moves "To Compel Enforcement" of the Judgment

Edward's father died in 2014. In 2016 Edward learned that Janet had listed the Woodside property for sale. In June 2017 he moved to "compel enforcement" of the 2004 judgment, seeking to "transfer[] his former 1/3 interest to his children" and for an accounting, a lien, attorney's fees and costs. Observing that the 2004 judgment "elevated [the] Settlement Agreement terms . . . to the status of Court orders" and that the court retained jurisdiction to enforce it, Edward asserted Janet violated the settlement by refusing to record the 2004 gift deeds that would have transferred his interest in the Woodside property to his children.

Janet opposed the motion. She noted that in 2005 the court ruled that Edward, not she, violated the judgment when he attempted to transfer his interest to Hollow Echo in breach of Paragraph 3.2. The parents had then exercised their right under Paragraph 3.2 to record the grant deed transferring Edward's interest in the Woodside property to themselves. "When Plaintiffs recorded the Grant Deed, Defendant had not yet transferred any of his interest in the Woodside Property to [his children]. Thus, Plaintiff's recordation of the Grant Deed effectuated a transfer of Defendant's entire 1/3 interest in the Woodside Property to Plaintiffs—a risk Defendant accepted when he signed the Settlement Agreement and later breached its terms." Edward's children submitted declarations stating their father never transferred any interest in the property to them and that they did not support, and would not participate in, his litigation against their grandmother.

The court denied Edward's motion. It explained: "This Court has already found that a valid Settlement Agreement was entered into between the parties, and reduced said agreement to a Judgment on December 7, 2004. [Citation.] This Court subsequently found that Defendant breached Paragraph 3.2 of the Settlement Agreement when he transferred his 1/3 interest in [the Woodside property] to an entity he created called Hollow Echo, LLC. The deed transferring Defendant's interest was therefore declared void. [Citation.]

"Paragraph 3.2 of the Settlement Agreement explicitly provides that 'during the lifetime of Plaintiffs, Plaintiffs shall have the absolute and exclusive right to manage, control, and exclusively occupy the Woodside Property. . . . Except as provided in Paragraphs 3.1 and 3.5, during the Plaintiffs' lifetime, Edward D. shall not have the right to take any action with respect to the Woodside Property including, but not limited to, transferring, hypothecating or encumbering his interests, without the prior written consent of Plaintiffs.' [Citation.]

"Importantly, this paragraph further provides that in order to ensure Defendant's compliance with this paragraph, he was to execute and deliver to Plaintiffs a grant deed transferring his remaining interest in the Woodside property to Plaintiffs (the 'Grant Deed'). If Defendant breached his obligation under this paragraph, Plaintiffs were authorized to record the Grant Deed. [Citation.]

"Thus, when this Court found that Defendant had breached Paragraph 3.2 [citation], Plaintiffs' right to record the Grant Deed was clearly triggered. Plaintiffs recorded the Grant Deed on March 1, 2005. [Citation.] Defendant has apparently been all along aware of the loss of his 1/3 interest in the Woodside property due to his actions [citation], yet to date has not taken any action to challenge the recordation of the Grant Deed.

"The Court is of the opinion and I so find, that under the Grant Deed recorded March 1, 2005, Janet E. Hume has every right to sell the Woodside property as she pleases free from any further interference from her son Defendant Edward D. Hume. She has had the absolute right to do so for over 12 years, including, under CCP, Section 664.6, the right to any related ancillary remedies to restrain Edward D. Hume from so interfering.

"Defendant has no standing to belatedly enforce paragraphs 3.1 and 3.5 of the Settlement Agreement, as his 1/3 interest in the Woodside property was transferred to Plaintiffs on March 1, 2005. Indeed, Defendant admits throughout his moving papers that he does not have any interest in the property. He cannot impose the constructive

trust and equitable lien that he seeks. Accordingly, the motion is Denied." Edward timely appealed from this order, in case no. A152546.

Next, Edward Moves to Vacate the Judgment as Void

On March 20, 2018, while his appeal was pending, Edward moved under section 473, subdivision (d) to vacate the 2004 judgment as void. Citing *Satya v. Chu* (2017) 17 Cal.App.5th 960 (*Satya*), he argued the court lacked jurisdiction to enter judgment on the settlement in December 2004 because the parties had dismissed the action some five months earlier.

Again, the court disagreed. After summarizing the litigation's tortuous history and noting Edward's assertion in 2017 that the court had jurisdiction to enforce the judgment under section 664.6, the court found Edward judicially estopped "from suddenly taking the completely opposite position now, when it suits him." Additionally, the court found Edward's position was precluded by the doctrine of the law of the case. "[T]he Court of Appeal has already upheld both the 2004 Judgment and the 2005 Orders after Judgment. Implicit in these holdings is that this Court had subject matter jurisdiction to enter the December 2004 Judgment and its post-judgment Orders; if it did not, they would not have been upheld on appeal. This principle is now the law of the case, and Defendant may not reinvent his position over a decade later."

Edward appealed this order as well. We consolidated the two appeals for purposes of briefing, argument and decision.

DISCUSSION

I. Edward's motion to vacate the 14-year-old judgment

Edward contends the court erred when it denied his 2017 motion to vacate the 2004 judgment. Citing *Satya*, *supra*, 17 Cal.App.5th 960, he asserts the court had no jurisdiction over the case when it entered judgment in December 2004 because the parties dismissed the action before requesting that the court retain jurisdiction under section 664.6 to enforce their settlement. Accordingly, he maintains, the 2004 judgment is void and may be challenged at any time. The assertion is unpersuasive.

Under section 664.6, "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement." *Satya* holds that where parties settle and dismiss a case *before* asking the court to retain jurisdiction for purposes of section 664.6, the court is thereafter without subject matter jurisdiction to enforce the settlement. (17 Cal.App.5th. at pp. 965-968). But *Satya* is not dispositive.

As a preliminary matter, it is not self-evident that the loss of jurisdiction occasioned by the dismissal of an action before asking the court to retain section 664.6 jurisdiction results in a *void*, rather than voidable, judgment. " 'When courts use the phrase "lack of jurisdiction," they are usually referring to one of two different concepts, although, as one court has observed, the distinction between them is "hazy." [Citations.] [Citation.] A lack of jurisdiction in its fundamental or strict sense results in ' "an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties." [Citation.] On the other hand, a court may have jurisdiction in the strict sense but nevertheless lack " 'jurisdiction' (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites." [Citation.] When a court fails to conduct itself in the manner prescribed, it is said to have acted in *excess* of jurisdiction.' [Citations.]

"The distinction is important because the remedies are different. '[F]undamental jurisdiction cannot be conferred by waiver, estoppel, or consent. Rather, an act beyond a court's jurisdiction in the fundamental sense is null and void *ab initio*. [Citation.] 'Therefore, a claim based on a lack of [ ] fundamental jurisdiction[ ] may be raised for the first time on appeal. [Citation.] "In contrast, an act in excess of jurisdiction is valid until set aside, and parties may be precluded from setting it aside by such things as waiver, estoppel, or the passage of time. [Citations.]" [Citations.]

"Whether the failure to follow a statute makes a subsequent action void or merely voidable ' "has been characterized as a question of whether the statute should be accorded 'mandatory' or 'directory' effect. If the failure is determined to have an invalidating effect, the statute is said to be mandatory; if the failure is determined not to invalidate subsequent action, the statute is said to be directory." [Citations.] [¶] Whether a particular statute is intended to impose a mandatory duty is a question of interpretation for the courts. [Citation.] " 'Unless the Legislature clearly expresses a contrary intent, time limits are typically deemed directory.' " (*People v. Lara* (2010) 48 Cal.4th 216, 225; see also *Airs Aromatics, LLC v. CBL Data Recovery Technologies, Inc.* (2018) 23 Cal.App.5th 1013, 1021-1022.)

Although *Satya* speaks of a void judgment, it does not examine the distinction between these two kinds of jurisdictional defects in the context of section 664.6. Nor, in our view, is it clear from a plain reading of section 664.6 that the Legislature intended a party's delay in asking the court to retain enforcement jurisdiction until after having dismissed the case pursuant to settlement would or should deprive the court of jurisdiction *in the fundamental sense*. This case demonstrates that such an interpretation could wreak havoc on the settled expectations of unwary parties.

But we need not base our resolution on this point. There is no need for us to decide whether the 2004 judgment was void or merely voidable. Edward moved to vacate the judgment under section 473, subdivision (d). That section provides that "[t]he court *may*, upon motion of the injured party, or its own motion, . . . set aside any void judgment or order." (Italics added.) "The inclusion of the word 'may' [in section 473, subdivision (d)] means that *even if the trial court determines the order or judgment was void, it still retains discretion to set the order aside or allow it to stand*." (*Nixon Peabody LLP v. Superior Court* (2014) 230 Cal.App.4th 818, 822, italics added; *Talley v. Valuation Counselors Group, Inc*. (2010) 191 Cal.App.4th 132, 146; *Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 495.) The ruling is discretionary, so we will not disturb it on appeal unless Edward establishes "a clear showing of abuse of

discretion, resulting in injury sufficiently grave as to amount to a manifest miscarriage of justice." (*In re Marriage of King* (2000) 80 Cal.App.4th 92, 118.)

He cannot do so. Edward accepted the benefits of the settlement agreement, then breached his own obligations to (1) transfer his interest in the Woodside property to his children; and (2) not otherwise transfer, hypothecate or encumber it. More than a decade later and after his father's death, Edward asked the court to exercise its continuing jurisdiction under section 664.6 to "enforce" his novel interpretation of the 2004 judgment under which his parents, not he, breached the settlement agreement in 2005. After the court denied that motion, Edward turned around and argued for the first time that the very same judgment was void all along because the court *never had jurisdiction* to enter it. The court again disagreed. We quote its reasoning:

"[J]udicial estoppel . . . [is] designed to prevent litigants from playing fast and loose with the courts. Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding, when such positional changes have an adverse impact on the judicial process, such as by creating a risk of conflicting judicial determinations, or enabling a party to gain an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. The doctrine is intended not only to maintain the integrity of the judicial system but also to protect parties from opponents' unfair strategies." The doctrine thus "prevents a party from 'asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. The doctrine serves a clear purpose: to protect the integrity of the judicial process.' . . . Defendant has previously taken the position that this Court did indeed have jurisdiction to enter the 2004 Judgment and to enforce its terms. While his Motion to Compel Enforcement of Judgment was ultimately denied, Defendant's procedural posture was accepted and relied upon as true by this Court and by Plaintiffs. The doctrine of judicial estoppel precludes Defendant from suddenly taking the completely opposite position now, when it suits him."

Whether the court's decision is more aptly framed as an exercise of its inherent discretion or an application of judicial estoppel, it is unassailable. " ' "The doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process." ' " (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181.) " ' "The policies underlying preclusion of inconsistent positions are general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings. . . . Judicial estoppel is intended to protect against a litigant playing fast and loose with the courts . . . . Because it is intended to protect the dignity of the judicial process, it is an equitable doctrine invoked by a court at its discretion." ' " (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 957.)

The court's refusal to allow Edward to conscript the judicial system in his seemingly unending game of "gotcha" was an appropriate exercise of discretion. " 'Although precise definition is difficult, it is generally accepted that the appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered.' " (*Brown v. Williams* (2000) 78 Cal.App.4th 182, 186.) There is no conceivable way the court's decision exceeded the bounds of reason or resulted in a miscarriage of justice.

II. Edward's Motion to "Enforce" the Settlement

Edward's appeal from the denial of his 2017 motion to "enforce" the settlement agreement by transferring his former one-third interest to his adult children is premised on his contention the court misconstrued the settlement agreement. In Edward's view, paragraph 3.5 required his parents to record the gift deed transferring two-thirds of his interest to his children *before* they could invoke the contractual remedy for his breach of Paragraph 3.2 by recording the grant deed transferring his interest to themselves. Accordingly, he maintains, two-thirds of his interest in the Woodside property should have gone to his children, and only the remaining third to his parents (and that, as we understand his argument, in trust for his children). We review this issue of contract

interpretation de novo, but because there was no relevant extrinsic evidence, we accept the trial court's interpretation "if such interpretation is reasonable, or if the interpretation of the trial court is one of two or more reasonable constructions of the instrument." (*Lundin v. Hallmark Productions, Inc.* (1958) 161 Cal.App.2d 698, 701.)

Such is the case here. The relevant terms of the settlement agreement are straightforward. To secure his compliance with his agreement not to alienate his interest in the Woodside property, Paragraph 3.2 required Edward to deliver to his parents a grant deed transferring his "remaining interest" to them. If Edward were to breach Paragraph 3.2 (as, it turned out, he almost immediately did), his parents could record the grant deed. The settlement agreement *also* established a gifting plan whereby Edward was to gradually gift two thirds of his interest to his children. To that end, Paragraph 3.5 required Edward to give his parents a prophylactic gift deed transferring two-thirds of his interest to his children, to be recorded *only* if he failed to comply with the gifting plan.

Edward seems to claim he completed his annual gifting obligations under Paragraph 3.5 when he delivered the prophylactic gift deed to his parents. Therefore, as we understand his argument, the grant deed executed and delivered to his parents pursuant to Paragraph 3.2 only transferred the remaining third of his interest, and, for reasons that are not clear from his written arguments, transferred it in trust for his children.

The trial court rejected this strained construction of the settlement agreement. The relevant provisions are clear and straightforward, as are their application to the events that transpired. They allowed the parents to record the grant deed in the event Edward breached his agreement not to sell, transfer or encumber his interest in the Woodside property. When he did so, his parents were entitled to invoke their clear contractual remedy by recording the grant deed. Once that occurred Edward had no interest in the property left to transfer to his children, and the prophylactic gift deed became superfluous. The trial court's construction of these provisions is entirely reasonable, so we will not disturb its ruling.

We need not reach the merits of Edward's barely articulated assertion that the trial court's construction of Paragraph 3.2 resulted in an unenforceable forfeiture. Edward made this claim for the first time in his reply to Janet's opposition to the motion to compel enforcement, so the trial court appropriately declined to address it. (See generally *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-1538; *Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, 1022.) He also forfeited it in this court by failing to support it with reasoned argument. (*Sviridov v. City of San Diego* (2017) 14 Cal.App.5th 514, 521.)

DISPOSITION

The judgment is affirmed.

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Siggins, P. J.

WE CONCUR:

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Fujisaki, J.

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Petrou, J.